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QUESTION PRESENTED

1. Whether this Court should now overrule its decisions in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), and *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), that the effect of section 27 of the Federal Power Act is limited to "control, appropriation, use or distribution of water in irrigation or for municipal or other uses *of the same nature*" (italics added), even though the language, structure and legislative history of the Act demonstrate an intent to commit comprehensive regulatory authority to the Federal Power Commission.

Or, to put the same question more specifically:

2. Whether the Federal Power Act preempts a state from regulating the manner of operation of a federally licensed hydropower project located on a non-navigable stream on federal land, where all water is returned to the stream, no state water rights are implicated and no other water user's rights are affected.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-333

STATE OF CALIFORNIA,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION and ROCK CREEK LIMITED PARTNERSHIP,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT ROCK CREEK LIMITED PARTNERSHIP

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1-13) is reported at 877 F.2d 743 (9th Cir. 1989). That opinion affirmed the Federal Energy Regulatory Commission's Order in Response to Request for Declaratory Order and Providing for Hearing (Pet. App. 14-22), reported at 38 F.E.R.C. ¶ 61,240 (1987), and its Order Denying Rehearing (Pet. App. 23-36), reported at 41 F.E.R.C. ¶ 61,198 (1987).

STATEMENT OF THE CASE

1. Nature of the Controversy

The Rock Creek Hydroelectric Project (the "Project") is a small-scale hydroelectric power plant located on

Rock Creek, a small, non-navigable tributary of the South Fork of the American River, in El Dorado County, California. The Project does not have significant water storage capacity, but instead produces electricity by diverting water from the creek through a man-made tunnel to a powerhouse, where the water drives turbines that generate electricity. The water is returned to Rock Creek at its confluence with the South Fork of the American River, approximately 5,100 feet downstream from the point of diversion. Initial Decision, 41 F.E.R.C. ¶ 63,019, at 65,117-18 (1987) (reprinted in the Appendix hereto).

Both the Project and the creek are located entirely on federally owned land administered by the Bureau of Land Management, except for a small portion owned in fee by the Partnership. Order Issuing License (Major), 23 F.E.R.C. ¶ 62,137, at 63,203 (1983) ("FERC License") (J.A. 13); Order WR 87-2, at 47-48 (Cal. St. Water Res. Control Bd. Mar. 19, 1987) (J.A. 83). By virtue of its FERC License, the Project is entitled to use "all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project." FERC License, 23 F.E.R.C. at 63,204 (J.A. 24). The Project's operation does not affect the water rights of others, as California conceded in related litigation:

> The State Water Board is not aware that any person other than the Partnership holds any prior appropriative or riparian water right that is affected by diversion of water from the Creek at the Project's diversion structure and the return of the water to the Creek at the Project's tailrace.

Stipulation of Facts ¶ 17, *Rock Creek Limited Partnership v. State Water Resources Control Bd.*, No. S-87-0523 (E.D. Cal. Aug. 21, 1987) (J.A. 142).

2. Grounds for Issuance of the FERC License

In reviewing the June 1, 1982 license application for the Project, the Federal Energy Regulatory Commission ("FERC") considered the need for, and benefits to be derived from, the Project, the Project's economic feasibility, and the Project's potential environmental impact. *See* FERC License, *passim* (J.A. 13). On April 29, 1983 FERC approved the Project and issued the License. *Id.*

In accordance with the statutory mandate of section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a) (1982), FERC considered the "bypass flow"[1] levels that would be appropriate for the purpose of protecting the trout fishery in Rock Creek. FERC License at 63,201 (J.A. 15). Based upon its review of all available information, FERC concluded that "factors other than the quantity of available adult habitat" in Rock Creek "are limiting fish production" and that "the release of the minimum flows on an interim basis as proposed by [the licensee] would not adversely impact the fishery resources of Rock Creek." *Id.* at 63,201 (J.A. 15-16). Accordingly, FERC ordered that, until completion of a comprehensive fishery study, the Project "shall discharge from the Rock Creek diversion dam interim continuous minimum flows in accordance with the following schedule . . .: May through September—11 cubic feet per second (cfs) and October through April—15 cfs." *Id.*, Article 37, at 63,204 (J.A. 25). In February 1984, approximately one year after the License was issued, the Water Board issued the Project a permit to appropriate water incorporating identical bypass flow requirements.

3. The Challenged FERC Rulings

Although the Water Board originally conformed its permit to the terms of the FERC License, in 1986 it con-

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[1] The "bypass flow" is the water flow that is not diverted from the creek for power generation but instead is left in the portion of the creek between the point of diversion and the point of return.

vened hearings on whether its permit should be amended to raise substantially the bypass flow under which the Project must operate. In response, the Partnership petitioned FERC for a declaratory order resolving which requirements, state or federal, would prevail. On March 11, 1987, FERC ruled that "the establishment of minimum flows is a matter beyond the reach of state regulation," 38 F.E.R.C. ¶ 61,240, at 61,773 (1987) (Pet. App. 17), that the flows stated in the FERC License prevailed over state requirements "irrespective of any action taken by [the State Board]" and that the "Rock Creek [Limited Partnership] must comply with the flow requirements of Article 37 of its [FERC License] until otherwise ordered by the Commission." *Id.* at 61,773, 61,774 (Pet. App. 18). Nonetheless, one week later the Water Board amended the permit it previously granted to require the Project to bypass 60 cfs in winter months and 30 cfs in summer.

In its March 11 order declaring exclusive FERC jurisdiction, FERC also scheduled hearings to allow the State Board and other interested parties to present evidence as to whether FERC should increase the Project's bypass flows. At those hearings, held later in 1987, California urged that the bypass flow specified by the FERC license be raised to 60 cfs in winter months and 30 cfs in summer. On November 16, 1987, the FERC administrative law judge issued an initial decision that the bypass flow should be raised to 20 cfs year round. Initial Decision, 41 F.E.R.C. ¶ 63,019, at 65,122 (1987) (reprinted in the Appendix hereto). All parties have filed exceptions to that ruling, which remain under submission with FERC pending action in this case.

SUMMARY OF ARGUMENT

I.

As this Court held in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), and *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), the Federal Power Act invests the Federal Energy Regulatory Commission with comprehensive and exclusive authority to license and regulate the operations of hydropower projects on navigable waters and federal lands. The Act requires FERC to investigate proposed projects thoroughly, to consider the views of state agencies and others concerning the projects, and to require modifications of projects so that "in the judgment of [FERC they are] best adapted to a comprehensive plan for improving or developing a waterway or waterways . . . ." 16 U.S.C. § 803(a) (1982). Thus, the scheme centralizes in FERC the final authority, subject to the supervision of the federal courts, to hear all views and consider all factors. As the Court stated in *First Iowa*, this scheme leaves "no room or need for conflicting state controls." 328 U.S. at 181.

Contrary to California's argument, the state law savings clause contained in section 27 of the Act does not allow states to defeat this comprehensive federal scheme of regulation by enacting superseding state regulations. Instead, the effects of section 27 are to protect vested water rights and to preserve state primacy in the regulation of irrigation, municipal, and other water uses outside FERC's jurisdiction. In *First Iowa* and *FPC v. Oregon*, this Court affirmed the exclusive nature of FERC's jurisdiction over hydropower projects on navigable waters and federal land, respectively. These rulings were essential to the result reached in the cases: that applicants for FERC licenses need not show compliance with the state regulations involved, since those regulations are preempted. Continued adherence to the holdings of

First Iowa and *FPC v. Oregon*, which repeatedly have been relied upon by this Court, FERC, license applicants, and Congress itself, is essential to the orderly operation and regulation of the nation's hydropower system.

II.

The legislative history of the Federal Power Act amply supports the exclusive nature of FERC's jurisdiction to regulate hydropower projects on navigable waters and on federal land. Although earlier proposed hydropower legislation envisioned a narrower role for the Commission, the legislative history of the legislation actually enacted in 1920 forcefully demonstrates the broad and exclusive character of the Commission's licensing and regulatory jurisdiction. It also demonstrates that section 27 was not intended to prevent operation of this broad federal regulatory scheme, but instead was directed at protection of vested water rights and preservation of state authority to allocate water uses outside the scope of the Act.

III.

The decision in *California v. United States* that section 8 of the Reclamation Act of 1902 preserves state authority to impose conditions on the Secretary of the Interior's construction and operation of federal irrigation projects in no way undercuts *First Iowa*'s construction of the Federal Power Act. The Reclamation Act, unlike the Federal Power Act, creates no comprehensive federal scheme of regulation and lacks a broad federal purpose. Moreover, in contrast to section 27 of the Federal Power Act, section 8 of the Reclamation Act expressly preserves state regulatory authority concerning the primary subject of the Reclamation Act—irrigation—and explicitly provides that federal administration of the Act must be in full compliance with state law.

Furthermore, *California v. United States* ruled that even under the Reclamation Act, explicit congressional

directives will preempt state laws. Application of that rationale requires a finding of preemption in this case, since in section 10(a) of the Federal Power Act Congress directed FERC to modify hydropower projects so that in FERC's judgment they are best adapted to a comprehensive plan for development of the nation's rivers. That congressional directive was confirmed and strengthened in the Electric Consumers Protection Act of 1986. California's attempt to substitute its judgment to require a different project on Rock Creek is contrary to that directive and is preempted.

IV.

In reality, California's attempt to regulate the Rock Creek Hydroelectric Project's bypass flows is indistinguishable from the state regulations this Court struck down in *First Iowa* and *FPC v. Oregon*. In each case the state sought to require release of water from the project's dam to preserve flows in the natural streambed. In both cases the state did so for the asserted purpose, among others, of preserving sport fishing opportunities. While that is a legitimate area of state concern, the state's proper means for achieving it is to present its arguments to FERC, not to usurp FERC's role and impose its own regulation.

Nor can California do what Iowa could not by the simple expedient of labeling its regulation a "water rights" order. This case involves no water rights. The affected portion of Rock Creek is entirely on federal land and the Project has the necessary federal reserved and state riparian rights to use the water. California law recognizes no water right for preservation of instream flows for fishing purposes and, by California's own admission, no water right other than those of the respondents are affected by the Project's operation.

ARGUMENT

I. THIS COURT HAS HELD REPEATEDLY THAT THE FEDERAL POWER ACT GRANTS FERC THE EXCLUSIVE AUTHORITY TO LICENSE AND TO REGULATE HYDROPOWER PROJECTS WITHIN ITS JURISDICTION

A. The Language and Structure of the Federal Power Act Establish Comprehensive and Exclusive Federal Regulation of Hydropower Projects on Navigable Waters and on Federal Lands, While Preserving State Law Concerning Water Rights for Other Uses

In 1920 Congress passed the Federal Water Power Act, 41 Stat. 1063 (1920), which subsequently was incorporated into the Federal Power Act of 1935, 16 U.S.C. §§ 791(a)-793, 795-818, 820-820r. The Act created a federal agency, the Federal Power Commission, now known as the Federal Energy Regulatory Commission, section 1, 16 U.S.C. § 792, and charged it with responsibility for administering the Act.

The Act broadly regulates the construction and operation of hydropower projects on navigable waters and federal lands by a comprehensive licensing scheme. It empowers FERC to conduct investigations concerning the nation's water power resources and their development, section 4(a), 16 U.S.C. § 797(a) (1982), and requires that all hydropower projects on "any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States," section 23(b), 16 U.S.C. § 817 (1982), apply for and obtain a license from FERC. It explicitly sets forth a multitude of license conditions in section 10, 16 U.S.C. § 803 (1982). Primary among the mandatory license conditions is that "the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways" for beneficial public uses. *Id.* The Act further empowers

the Commission to require the modification of any project to secure such a comprehensive plan, *id.*, and to impose whatever other license conditions it deems appropriate, section 10(g), 16 U.S.C. § 803(g).

Despite this expansive licensing scheme and the broad powers the Act confers on the Commission, California argues that section 27, the Act's state-law savings provision, allows states to defeat FERC's efforts at comprehensive regulation by imposing their own, different regulations. Section 27 provides, in its entirety:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821. California and its supporters urge that this savings provision should be read in isolation from the rest of the Act, so that no state law concerning any use of water is in any way affected by the other provisions of the Federal Power Act.

Despite the state's arguments for "facial construction" based upon "plain meaning," section 27 did not have, in its historical context, the expansive "plain meaning" it suggests. Instead, section 27 was intended to preserve state-conferred vested water rights for irrigation, municipal, mining, and similar purposes from uncompensated takings, *see Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369 (1930), and to ensure continued primacy of state law respecting water uses outside FERC's jurisdiction.

The state's "plain meaning" interpretation of section 27 would render the remainder of the Federal Power Act meaningless. Pursued to its logical conclusion, this "plain meaning" argument would allow states themselves to authorize hydropower projects on navigable waters without

the federal licenses required by the Act, since "nothing" in the Act is "intend[ed] to affect or in any way interfere" with state laws concerning water use. Similarly, it would allow states to substitute their judgment for that of FERC as to what "comprehensive plan" for waterway development is appropriate. It would also allow states to veto the projects that FERC has adapted to conform to the comprehensive plan that Congress has directed FERC to develop. In short, California's position would usurp Congress's "preeminent authority to regulate the flow of navigable waters," *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982), and render both FERC and the Federal Power Act impotent.

B. This Court's *First Iowa* Decision Established the Preemptive Effect of the Federal Power Act

This Court first explored the interrelationship of the Commission's jurisdiction and state law in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946). The Court there considered and rejected the contention now urged by California that section 27, in saving state laws concerning irrigation, municipal, or "other uses" of water from preemption, authorizes states to regulate the operations of federally licensed hydropower projects. A private developer proposed a project that would divert water from the Cedar River at Moscow, Iowa, transport that water by canal ten miles to Muscatine, Iowa, on the Mississippi River, and there generate electricity as the water fell 101 feet to the level of the Mississippi. 328 U.S. at 157-58. The project's diversion would leave only 25 cfs of water in the Cedar River from Moscow downstream 29 miles to the Cedar River's confluence with the Iowa River, thereby allegedly hindering navigation and harming the river's fishing.[2]

[2] *Id.* According to the State of Iowa, this diversion would result in "an absolute destruction of navigation or commerce" on the Cedar River, would "undoubtedly create a health hazard and nuisance," would "destroy the recreational and fishing facilities afforded to the public in the Cedar River as now constituted," would inundate three United States highways and one state primary highway, and would make the lower portion of the Cedar River "a dry run." Brief for the State of Iowa, Intervenor at 4; Petition for Rehearing by the State of Iowa, Intervenor at 4.

When the developer sought a federal license for the project from the Federal Power Commission, Iowa intervened to oppose the application. 328 U.S. at 159. Iowa argued that the project developer had failed to comply with section 9(b) of the Federal Power Act, which requires that, to obtain a federal license, an applicant must submit

> [s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes . . . .

16 U.S.C. § 802(b) (1982). Iowa noted that the project had not, as required by section 7767 of the Iowa Code, obtained a permit from the Iowa Executive Council to construct a dam and further that it could not obtain such a permit because the project violated section 7771 of the Iowa Code, which required that "any water taken from the stream in connection with the project [must be] returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life . . . ." 328 U.S. at 165-66, 170 (emphasis omitted). Since the project had not complied with either of these state statutes, the Federal Power Commission ruled that the applicant had not presented satisfactory evidence of compliance with Iowa's laws and therefore dismissed the license application. *Id.* at 162.

This Court reversed the dismissal in an opinion which it stated "illustrate[d] the integration of federal and

state jurisdictions in licensing water power projects under the Federal Power Act." *Id.* at 156. After reviewing the legislative history, purpose, and structure of the Federal Power Act, the Court declared:

> We find that when [the Federal Power] Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States. The solution reached is to apply the principle of the division of constitutional powers between the State and Federal Governments. *This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter.*

Id. at 171 (emphasis added). The central theme of the opinion—that the Federal Power Act prohibits concurrent state and federal regulation over the licensing of federal hydropower projects—was reiterated numerous times:

> The resulting integration of the respective jurisdictions of the State and Federal Governments is illustrated by the careful preservation of the separate interests of the States throughout the Act, *without setting up a divided authority over any one subject.*

Id. at 174 (emphasis added). And again:

> The detailed provisions of the Act providing for the federal plan of regulation leave no room for conflicting state controls.

Id. at 181. Thus, *First Iowa* made clear that the Act preempted all state regulation on those subjects which the Act placed under the regulatory authority of the Federal Power Commission.

The Court then addressed and rejected Iowa's contention that section 27 preserved the state's right to regulate federally licensed hydropower projects:

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights.

328 U.S. at 175-76. The Court held that section 27 did not authorize Iowa's attempt to regulate the use of water by federally licensed hydropower projects, but instead related only to protection of state-conferred water rights. The case then was reversed and remanded to the Federal Power Commission [3] for consideration of the license application without regard to the requirements of sections 7767 and 7771 of the Iowa Code. *Id.* at 183.

C. *First Iowa*'s Ruling on the Scope of Section 27 Was Not Dictum

California argues that this Court may disregard *First Iowa*'s interpretation of section 27 because that case purportedly held "only that section 9(b) of the FPA does not require hydropower projects to acquire state permits as a 'condition precedent' to acquiring FERC licenses." (Pet. Br. at 6). California contends that since FERC has already licensed the Rock Creek Hydroelectric Project, *First Iowa* is inapplicable.

The argument that *First Iowa* decided only the procedural requirements of section 9(b) both trivializes the *First Iowa* decision and ignores the Court's reasoning in ruling that section 9(b) had been satisfied—reasoning premised on a determination that the Iowa requirements were preempted.

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[3] Thus, California's reliance on FPC reports from the 1920s and 1930s (Pet. Br. at 35 n.17) represents views which this Court repudiated in *First Iowa*.

Neither the parties nor the Court had any doubt that the case squarely presented the preemption issue. In First Iowa's petition for certiorari, one of the Questions Presented framed the preemption issue as follows:

> Whether, with respect to navigable waters of the United States within the State of Iowa, Chapter 363 of the Iowa Code of 1939 was superseded by the Federal Water Power Act of 1920, as amended, which became Part I of the Federal Power Act of 1935 by Title II of the Public Utility Act of 1935 (49 Stat. 838).

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 4 (question 6).[4] Or, as more succinctly stated in the State of Iowa's opposition to the petition:

> Whether the Federal Government has preempted the entire field in the enactment of the Federal Power Act to the exclusion of the provisions of the State law as contained in Chapter 363 of the Code of Iowa.

Intervenor's Resistance to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 3 (question 4); *see also* Brief for the Federal Power Commission, Respondent at 3 (question 3). The petition was granted without limitation of the questions to be reviewed, 326 U.S. 715 (1946), and, accordingly, the preemption issue was squarely presented.

As the Court noted in the opening sentence of its *First Iowa* opinion, the case was not limited to the narrow issue of the procedural requirements of section 9(b), but rather "illustrate[d] integration of federal and state jurisdictions . . . ." 328 U.S. at 156. The section 9(b) holding only reflects the Court's underlying holding that section 27 did not save the Iowa laws from preemption:

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[4] *See also id.* at 3-5 (questions 1-4, 10, and 11).

> If a state permit is not required [under section 27], there is no justification for requiring the petitioner, as a condition [under section 9(b)] of securing its federal permit, to present evidence of the petitioner's compliance with the requirements of the State Code for a state permit. Compliance with state requirements that are in conflict with federal requirements may well block the federal license.

328 U.S. at 166-67. It would have made little sense to rule that state regulations were invalid under section 9(b) during the license application process if those same regulations would have prohibited the project's operation under the license once it was issued.

The specious nature of California's attempt to restrict *First Iowa*'s invalidation of state regulations to the period before issuance of a license is illustrated by the facts of *First Iowa* itself. One of the provisions of Iowa law at issue was section 7767, which forbade not only the construction, but also the maintenance and operation, of dams without a permit from the Iowa Executive Council. *See* 328 U.S. at 164. That permit could never have been issued to the *First Iowa* petitioners because of the requirement of section 7771 of the Iowa Code that any water used must be returned to the stream at the nearest practicable place. *Id.* at 165-66, 170. Thus, if *First Iowa* were limited to pre-license preemption as California urges, the case would have involved nothing more than a refusal by the Federal Power Commission to license a hydropower project that, pursuant to state law, could never have operated anyway. Such a case would have involved neither an abuse of discretion warranting reversal of the Commission nor an "important question of federal law" warranting the discretionary review given by the Court.

D. *Federal Power Commission v. Oregon*

This Court reaffirmed *First Iowa*'s construction of section 27 nine years later, when it was applied to a project

which, like the Rock Creek Project, was located on a nonnavigable stream on federal land. In that case, *FPC v. Oregon*, 349 U.S. 435, 437-38 (1955), Oregon challenged the Federal Power Commission's issuance of a license to a private developer for construction of a hydropower project on the Deschutes River in Oregon. Oregon contended that the license conditions did not provide adequate protection for breeding fish. *Id.* at 437. Relying on *First Iowa*, the Court again found exclusive federal authority to regulate federally licensed hydropower projects, saving state law from preemption only to the extent necessary to protect vested water rights of others. *Id.* at 441-46. In the Court's view, there was

> no question as to the constitutional and statutory authority of the Federal Power Commission to grant a valid license for a power project on reserved lands of the United States, provided that, as required by the Act, the use of the water does not conflict with vested rights of others.

Id. at 444-45 (citing section 27). In reliance upon *First Iowa*'s construction of section 27 and *without even a citation to section 9(b)*, the Court invalidated Oregon's attempt to impose its own fishery protection measures on the project's operation:

> To allow Oregon to veto such use [of water by the project], by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision. No such duplication of authority is called for by the Act.

349 U.S. at 445 (citations to *First Iowa* omitted). Thus, in *FPC v. Oregon* this Court squarely interpreted *First Iowa* to preclude states from relying on section 27 to impose fish protection measures on federally licensed projects located on federal land.[5]

[5] *See* brief filed in this case by the Modesto Irrigation District and the Turlock Irrigation District, as *amici curiae*, Part IIC.

E. The Courts and Private Licensees Have Relied Upon *First Iowa* for More Than Forty Years

The interpretation of the Federal Power Act first announced by this Court in *First Iowa* has been uniformly followed in the ensuing years. Courts, the Commission, and hydropower project operators all have proceeded on the basis that the Commission's requirements as to project operation are authoritative. Indeed, the *First Iowa* rule has given rise to a well developed regulatory scheme under which hundreds of projects have been constructed.[6]

Consistent with authority in this Court since 1946,[7] lower court adherence to the *First Iowa* rule has been frequent, long-continued and uniform. Thus, in *Portland General Electric Co. v. Federal Power Commission*, 328 F.2d 165, 176 (9th Cir. 1964), the Ninth Circuit held that section 27 is limited to preserving a right to compensation where state-conferred rights are taken by a licensee under the Federal Power Act.[8] The Second Circuit has followed suit.[9] District courts also have followed

[6] *See, e.g., amici curiae* brief filed in this case by Pacific Northwest Utilities, *passim*, for a discussion of more than one hundred hydroelectric projects that are operated as a coordinated interstate and international system in the Pacific northwest.

[7] *See, e.g., Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 773 (1984); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 334-39 n.6 (1982).

[8] *See also Public Util. Dist. No. 1 v. City of Seattle*, 382 F.2d 666, 670 n.6 (9th Cir. 1967), *cert. dismissed*, 396 U.S. 803 (1969); *Washington Dept. of Game v. Federal Power Comm'n*, 207 F.2d 391, 396 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954); *United States v. Central Stockholders' Corp.*, 52 F.2d 322, 330-32 (9th Cir. 1931) (section 21 of the Federal Power Act, 16 U.S.C. § 814, gives licensees the power of condemnation).

[9] *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 453 F.2d 463, 478 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); *see also Board of Elec. Light Comm'rs of Burlington v. McCarren*, 725 F.2d 176, 178 (2d Cir. 1983).

First Iowa's lead. *See, e.g., Mega Renewables v. County of Shasta*, 644 F. Supp. 491, 499 (E.D. Cal. 1986); *Town of Springfield, Vt. v. McCarren*, 549 F. Supp. 1134, 1154-57 (D. Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir.), *cert. denied*, 464 U.S. 942 (1983); *Town of Springfield, Vt. v. Vermont Env'tl Bd.*, 521 F. Supp. 243, 248-49 (D. Vt. 1981). Thus the Ninth Circuit's decision in this case is clearly in accord with settled law and the expectations of federal licensees under the Act.

II. THE LEGISLATIVE HISTORY OF THE FEDERAL WATER POWER ACT OF 1920 SUPPORTS THE DECISION OF THE COURT OF APPEALS

Relying on snippets of floor debates concerning water power bills never enacted and on admittedly antique notions as to the power of the federal government under the Constitution,[10] California creates a legislative "history" that is wholly at odds with historical fact.[11] According to California, the framers of the Federal Water Power Act, after more than a decade of effort to enact federal water power legislation, happily "deferred" to state regulation of water use as the answer to the need for comprehensive regional planning for the development of the new energy source.

The actual course of history was precisely the opposite. Congress did *not* decide in the Federal Water Power Act to "defer" to state regulation of water power. Instead,

[10] Under this Court's contemporary decisions, the power of Congress to preempt state regulation of development of hydroelectric power on federal lands is beyond question. *See Kleppe v. New Mexico*, 426 U.S. 529 (1976). California's brief at times appears to concede this, but at other times implies to the contrary. (Pet. Br. at 18-22).

[11] The same arguments from legislative history that California makes here were raised, but rejected, by this Court in *First Iowa*, as the *amici curiae* brief of the Modesto and Turlock Irrigation Districts demonstrates in detail.

after years of debate in which the "states' rights" arguments California makes here were advanced again and again in the political arena, Congress *deliberately rejected* a policy of deference *in favor of a scheme of comprehensive federal regulation in which state regulators were to take a primarily advisory and consultative role.* That Congress so chose is manifest throughout the legislative history of the bill actually enacted—H.R. 3184, 66th Cong., 2d Sess. (1920). It is equally obvious when prior legislative efforts are considered. The "legislative history" California presents here is taken out of context from start to finish in an effort to have this Court decide policy issues resolved on the floors of Congress seventy years ago.

A. The Legislative History of H.R. 3184 Confirms the Primacy of Federal Regulation of Water Power Development

As this Court stated in *First Iowa*, the purpose of the Federal Water Power Act was common knowledge at the time of its enactment: to create a "complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of . . . other federal laws previously enacted." 328 U.S. at 180. Hoping that time has erased this collective memory, California culls question-begging remarks about state "water rights laws" from floor debates occurring during four different terms of Congress and concerning (counting House and Senate versions separately) essentially six different bills.[12]

[12] California's treatment of the legislative history is particularly flawed with respect to H.R. 16673, 63rd Cong., 3d Sess. (1914). The legislators California quotes—representatives Mondell and Taylor—did not even support passage of H.R. 16673, because they believed it intruded improperly on the rights of the states. 51 Cong. Rec. 13630, 13680 (1914).

California's presentation obscures the fact that the legislative history of H.R. 3184, the bill actually enacted, abounds with statements from supporters and detractors alike acknowledging or asserting that the bill created a scheme of national, rather than local, regulation of water power development. Indeed, the reports of both houses of Congress regarding H.R. 3184 expressly emphasize that the problems addressed by the bill were *national* in scope, requiring a regulatory scheme that operated at the *federal* level:

> 'The bill . . . provides that the administration of water powers within Federal jurisdiction . . . be directed toward a *constructive national program of intelligent, economical utilization of our power resources.* To accomplish this purpose it gives the commission sufficient organization and authority to enable it to undertake, in cooperation with other agencies, the fundamental studies and investigations upon which such a program must be founded if it is to be effective. *The problems are national, rather than local; they transcend State lines, and can not be handled adequately except by or in conjunction with national agencies.*'

H. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919) (quoting Secretary of Agriculture D. F. Houston) (emphasis added); S. Rep. No. 180, 66th Cong., 1st Sess. 5-6 (1919) (incorporating House report). Hearing testimony was to the same effect:

> On account of the extent of the territory which will be involved and of the fact that the power transmission system must ignore State lines, no authority less than the Federal Government will have sufficient jurisdiction either to conduct the investigations or to exercise control over the completed systems.

Water Power: Hearings Before the Committee on Water Power, 65th Cong., 2d Sess. (1918) (statement of Administration spokesman O.C. Merrill, at 9).

Moreover, throughout the floor debates, Congress was made fully aware that its goal of regulating at the national level was to be achieved by a commission holding final decisionmaking authority. Representative Gordon Lee, a Floor Manager and member of the House Committee on Water Power,[13] described the main points of the bill as follows:

> *No development [of water power rights] can be made by any agency other than the United States itself, except under the authority of and in accordance with the provisions of a license issued by the commission.* . . . Existing laws which provide for a different disposition of water-power rights are to be repealed.

59 Cong. Rec. 6527 (1920) (emphasis added).[14] In other words, a state agency could not, as here, substitute its own judgment for that of the Commission with respect to issues addressed and resolved by the latter in accordance with the Act's provision for "comprehensive" fed-

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[13] The views of floor managers and committee members are generally assumed to have been adopted by Congress absent evidence to the contrary. *See, e.g., National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 639-40 (1967).

[14] Representative John Esch, a House Floor Manager and Chairman of the House Committee on Water Power, was equally blunt that the Commission's judgment is not to be second guessed:

> Mr. HULINGS. Mr. Chairman . . . I remember . . . there was a great deal of complaint [that] the handling of the public lands in the West by the Secretary of the Interior . . . was arrogant . . . injudicious . . . unwise . . . [and] partisan. . . . Are [the commissioners] to have unlimited control of the licensing of these water rights, without any right of appeal to any other authority?
>
> Mr. ESCH. Subject to the provisions and limitations of the act. Of course, if officials of the Government violate an act, there is a remedy . . . in the courts. . . . *But there is no appeal from the decision of the commission on any matter that is within the jurisdiction of the commission under this act.*

58 Cong. Rec. 2026-27 (1919) (emphasis added).

eral regulation. Such issues committed to the Commission were understood to include whether, and on what conditions, water could be used for power purposes:

> This is a power bill and grants rights for power. Now, if a party appropriates water under State law . . . they will have that additional property right in addition to the power privilege granted here; *but this bill is for the purpose . . . of giving authority to create power and utilize water for power purposes.*

Hearings, *supra*, at 92 (1918) (remarks of Representative Taylor) (emphasis added).

The comments of critics and opponents of the bill are equally revealing. They show that Congress considered, *but rejected*, the same constitutional contentions and parochial approach that California evidently believes shaped, or should have shaped, the Act. One of the more impassioned such critics was Senator King:

> It had been my purpose to do everything within my power in a parliamentary way to defeat the conference report. The general theory of the bill is in contravention of the rights of the States, and many of its provisions are so hateful and oppressive . . . that I regard its passage as a great calamity. Unfortunately the views which I entertain respecting this measure are not shared by many members of the legislative branch of the government . . . .
>
> . . . Notwithstanding there is no plenary or other power in the Federal Government to exercise any control over the streams of the United States, except to prevent interference with their navigation, this bill seeks the control of all sources of hydraulic power in the United States as well as the control of all streams therein.

59 Cong. Rec. 7778-79 (1920).

In short, it is plain that Congress knew what it was doing in 1920 when it adopted the language that, as *First Iowa* held, commits comprehensive, and final, regulatory authority to federal, and not state, regulators. Necessarily, Congress also realized that a scheme of this nature would preempt state law and state regulation. Indeed, when it was suggested in committee hearings that the bill be amended to require proof that the license applicant had in fact "obtained the consent of the duly constituted authorities of the State" to the water power project proposed, the suggestion was rejected after Representative Raker of California objected that it "would practically change the fundamental principle of this bill," because "the whole scheme would be subject to the regulation and control, in effect, of the State." Hearings, *supra*, at 364 (1918).

B. History Refutes California's Contention that the Federal Water Power Act Continued a Congressional Tradition of Deference to State Water Law

California assets that in enacting the Federal Water Power Act, Congress must be presumed to have followed a traditional "policy of 'purposeful and continued deference to state water law.'" (Pet. Br. at 18) (quoting *California v. United States*, 438 U.S. at 653). Even granting that there was such a traditional policy, however, California's argument that Congress followed that tradition in drafting the Federal Water Power Act is simply untrue as an historical matter.

It is true that during the many years in which federal water power legislation was debated, some members of Congress believed that the states "owned" all intrastate waters or that the federal government constitutionally could not regulate water power. These congressmen allied themselves with colleagues from western states, who opposed the federal government's continued ownership of vast stretches of nontaxable public lands, and with others who simply opposed nonlocal regulation of any sort. The alliance, which opposed federal regulation though desir-

ing to facilitate development of water power, was indeed powerful, but it was not controlling: it was opposed by an equally strong and determined faction which believed that comprehensive regulation of water power development was both constitutional [15] and desirable.[16]

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[15] *See, e.g.*, H. Rep. No. 16, 64th Cong., 1st Sess. 11-12 (1916) ("Much opposition to [reserving title to water power sites on federal lands] has arisen in the West, those opposed asserting that inasmuch as the water belongs to the States that the mere fact that the Federal Government owns the sites does not warrant the Government in holding them and seeking to generally control and regulate the projects. [¶] Your committee could not follow this contention, believing it to be the duty of the Federal Government where the Government owns the site to properly use it, to properly aid in its development, but at all times to fully retain control and properly regulate in the public interest"). *See also* 53 Cong. Rec. 547, 549, 550 (1916) (remarks of representatives Ferris and Lenroot to the same effect). With regard to the constitutional argument advanced in favor of regulation of water power development on navigable waters, *see, e.g.*, 59 Cong. Rec. 1100 (1920) (remarks of Senator Lenroot).

[16] These congressmen believed that regulation should occur at the federal level in order to address problems of interstate monopoly, *and to coordinate rationally the development of natural resources on a regional basis.* They were trust-busters and conservationists, and Theodore Roosevelt was their mentor. *See* 43 Cong. Rec. 978 (1909) (message from President Roosevelt) ("the great corporations are acting with foresight, singleness of purpose and vigor to control the water powers of the country. They pay no attention to state boundaries, and are not interested in the Constitutional law affecting navigable streams, except as it affords what has been aptly called a 'twilight zone' where they may find a convenient refuge from any regulation"); 42 Cong. Rec. 6966 (1908) (letter from Roosevelt to members of the Inland Waterways Commission) ("works designed to control our waterways have thus far usually been undertaken for a single purpose, such as the improvement of navigation, the development of power, the irrigation of arid lands, the protection of lowlands from floods, or to supply water for domestic and manufacturing purposes. While the rights of the people to these and similar uses of water must be respected, *the time has come for merging local projects and uses of the inland waters in a comprehensive plan designed for the benefit of the entire country. Such a plan should consider and include all of the uses to which*

For years, the opposing sides blocked enactment of water power bills. The bills cited by California—H.R. 16673 and H.R. 408—together with a number of others, were introduced, extensively debated, and then voted down. The conservationists controlled the House, while the states' rights advocates had considerable strength in the Senate. During the stalemate, virtually all water power development on federal lands and navigable waters stopped.[17]

Ultimately, however, the advocates of federal regulation prevailed. The Western states were anxious to develop their vast water power resources, which were located largely on public lands lying within their borders. This desire became more pressing after an energy shortage brought about by World War I. After their long fight, the Westerners despaired of ever seeing control of the

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streams may be put, and should bring together and coordinate the points of view of all users of waters"). *See also* 53 Cong. Rec. 530 (1916) (remarks of Representative Ferris); H. Rep. No. 16, 64th Cong., 1st Sess. (1916).

[17] The impediments were both legal and practical. Initial regulatory efforts by the federal government over waterways, aimed at policing obstructions to navigation, required Congressional approval for construction of water projects on navigable waters. Rivers and Harbors Act of 1884, 23 Stat. 133; Rivers and Harbors Act of September 19, 1890, 26 Stat. 426; Act of 1899, 30 Stat. 1121. President Roosevelt, however, announced that he would veto any special legislation directed at developing water power until strict federal controls were enacted. 42 Cong. Rec. 4698 (1908). After he made good his threat a number of times, water power interests stopped trying. Meanwhile, the Secretary of the Interior was taking an equally stern stand against uncontrolled development of water power sites on public lands, *see, e.g.*, 51 Cong. Rec. 13630 (1914) (remarks of Representative Mondell), over which he had authority under a 1901 Act (31 Stat. 790 (1901)) to grant rights of way. Because the Secretary's permits were revocable, water power companies decided not to risk their capital on development of public lands sites.

For general discussions of these events, including the delay in development of water power, *see* G. Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945); H. Rep. No. 61, 66th Cong., 1st Sess. 2-5 (1919).

water power sites pass to the states, and their disappointment was eased somewhat by provisions in the Federal Water Power Act that they would share in the licensing fees collected by the federal government. The Federal Water Power Act became law.

Thus, California's contention that Congress in enacting the Federal Water Power Act simply assumed that the Act would follow a tradition of federal deference to state regulation is not tenable. The quotations California presents are only one side—and the losing side—of a bitterly fought jurisdictional battle in which the positions taken were deliberate and explicit, not implied or automatic. That this battle occurred, and that it was resolved in favor of federal regulation, is evident from a review of the legislative reports on the bills introduced by the two factions [18] and, from a comparison of the Federal Water Power Act with the objections contained in the minority reports. It is also evident from examination of the terms of other bills, drafted by the states'

[18] The Senate versions of H.R. 408 and H.R. 16673 contain the following language: "No lease shall be granted until the applicant has the right from the State or States wherever such a project is to be located to sufficient water to develop or generate the electrical energy intended to be generated by the applicant's proposed project." S. Rep. No. 66, 64th Cong., 1st Sess. 1 (1916). Those unenacted bills also permitted, upon approval by the State involved, entry by any person onto the public land leased by the United States for water power development for purposes of using that land for impounding and conveying waters for irrigation or other purposes. *Id.* at 4. The bills stripped the federal regulator—in this version, the Secretary of the Interior—of almost all discretion, "directing" him to issue licenses in accordance with "general regulations" rather than permitting him to impose conditions case-by-case. S. Rep. No. 898, 63d Cong., 3d Sess. 3 (1915). The House bills contained none of these terms.

See also the minority reports filed by states' rights advocates to accompany S. Rep. No. 898, 63d Cong., 3d Sess. (1915) (pertaining to H.R. 16673) and S. Rep. No. 66, 64th Cong., 1st Sess. (1916) (pertaining to H.R. 408).

rights faction, that never emerged from committee.[19] Clearly, Congress was well aware of its alternatives, but ultimately chose a scheme of comprehensive regulation operating at the federal level.

C. The Legislative History of the Federal Water Power Act Fails to Support California's Construction of Section 27 of the Act

Even though it largely pertains to bills never enacted, the extended legislative history on which California relies in its brief does illuminate the meaning of section 27 of the Federal Water Power Act, although not in the way California intends.

First, Congress's use of the same saving clause in bills with such divergent approaches (*see supra*, n.18) supports respondents' position that the clause's meaning can be gleaned only from its context in the particular piece of legislation as a whole. In these circumstances, parsing of the language of the clause *in vaccuc* is unlikely to be meaningful.

Second, while arguing for the broadest possible reading of section 27, the states' rights advocates who kept inserting it in the various water power bills that California cites *admitted repeatedly* that if the clause were read to encompass all of their misgivings about the respective roles of the state and federal governments under those bills, it would conflict with virtually every other substantive provision being proposed. *See* S. Rep. No. 66, 64th Cong., 1st Sess. 15 (1916) (minority report at 15); 51 Cong. Rec. 13631 (1914) (remarks of Representative

[19] *See, e.g.*, S. 7432, 61st Cong., 2d Sess (1910) (authorizing the President to withdraw from "all forms of settlement, entry, or other disposition any lands which are or may become chiefly valuable for the development of water power, and providing for the acquisition, by any State . . . under certain conditions, of any lands so withdrawn"). *See also* 53 Cong. Rec. 558 (1916) (advocating a right of way bill for power development which would provide that every permit would be conditioned on the state's right to supervise and control the project) (remarks of Representative Mondell).

Mondell); 51 Cong. Rec. 14070 (1914) (Representative Mondell); 53 Cong. Rec. 740 (1916) (Representative Mondell).[20] The only possible conclusion is that the view those advocates propounded—one which reserved final regulatory authority to the states—was not shared by their colleagues.

Third, the legislative history makes clear that the real role intended by Congress in the enactment of section 27 was the preservation of existing allocations of water to irrigation (and, to a lesser extent, municipal, mining, and domestic) uses. As stated by Representative Taylor of Colorado:

> Mr. Chairman, if the gentleman does not want to deliberately take away the vested rights of the Western States to the waters which our people own and are now using for irrigation of their growing crops, he would not offer this kind of an amendment [to strike the savings clause] . . . .
>
> Practically every drop of the natural flow of the waters of every stream in every Western State to-day is appropriated and being beneficially used. . . .
>
> *We are not objecting to its being used for power purposes. It does not diminish the water as it falls down the mountainside and turns a wheel. But if you permit these power companies to take the water out of that stream and divert it from its use for irrigation and disregard the irrigators' rights, you simply destroy the vested rights of 40 years in the West.*

51 Cong. Rec. 14067 (1914).

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[20] Indeed, in Representative Mondell's remarks (some of which are quoted at length in the *amici curiae* brief of Pacific Gas and Electric Company, Southern California Edison Company, and Utah Power & Light Company in this case), this proponent of states' rights admitted that the language of section 27 is not as broad as that of section 8 of the Reclamation Act, and suggested that "power" be added to the list of "uses" reserved for state regulation under section 27. The suggestion was not adopted.

This was the tenor of the remarks offered when congressmen inquired as to the meaning of section 27.[21] Significantly, the "uses" described are *consumptive* or *proprietary*. No mention was made—and California cites none—of any intention to reserve to the states authority to impose their own views as to the relative priority of public interests in, on the one hand, development of hydropower capabilities, and, on the other, the protection of fisheries existing on public lands. No example that is even remotely analogous was offered. Instead, Congress's reading of section 27 was concrete and limited, bounded by Representative Taylor's explanation of the problems the clause was designed to address. While the language of section 27 read in isolation may be overbroad in expressing Congress's intent, little more can be expected of a savings clause that was, to repeat, inserted indiscriminately in a wide variety of bills.[22]

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[21] *See also, e.g.*, 59 Cong. Rec. 1041 (1919) ("So far as irrigation is concerned, and so far as the use of water for domestic purposes is concerned, the bill saves to the States all rights that they have under their State legislation") (remarks of Senator Nelson); 59 Cong. Rec. 245 (1919) ("The bill expressly provides that nothing contained therein shall affect or interfere with the laws of the respective States relating to the control of or use of water used for irrigation or for municipal purposes") (Senator Jones); 56 Cong. Rec. 9115 (1918) (describing section 27 as "the savings clause of our irrigation right") (Representative Taylor).

[22] *Cf. United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (where the plain meaning of a provision is completely at variance with the purpose of the statute, as revealed by legislative history and the historical context in which the legislation was enacted, the plain meaning should be disregarded); *Cass v. United States*, 417 U.S. 72, 83 (1974) ("in resolving ambiguity, we must allow ourselves some recognition of sheer inadvertance in the legislative process"); *Zambardino v. Schweiker*, 668 F.2d 194 (3d Cir. 1981) (to the same effect; rejecting plain meaning as contrary to intent of Congress as revealed by legislative history); *J.C. Penney Co. v. Comm'r*, 312 F.2d 65 (2d Cir. 1962) (refusing to construe language that was originally surplusage as imbued with meaning following an amendment, because plain meaning of amended lan-

The legislative history does not support California's argument regarding section 27—an argument that, in essence, construes the unrevealing language of the clause to undo all that the Federal Water Power Act otherwise provides. The debates show instead that Congress meant nothing more ingenious or imaginative than that irrigators, towns, and mines could continue to use water that had already been promised to or held by them. The Court should so construe it.

D. The Language and Legislative History of the Electric Consumers Protection Act Confirm the Final Authority of FERC Under the Federal Power Act to Reconcile Competing Public Interests Affected by Water Power Projects

For over forty years, Congress has refrained from legislatively overturning *First Iowa* and its progeny, thus plainly evidencing satisfaction with the correctness of this Court's holdings in those cases. The several cases, of long standing, should not be simply brushed aside on the vacuous ground that they are simply "dicta." *Patterson v. McLean Credit Union*, 109 S.Ct. 2363, 2371-72 n.1 (1989); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).[23] But even if an affirmative congressional endorsement of the Court's rulings were necessary, Congress's enactment in 1986 of the Electric Consumers Protection Act ("ECPA"), which amends the Federal Power Act, clearly confirmed the understanding of the legislative branch that FERC has the ultimate authority for reconciling the competing public interests—including, expressly, those involving protection of fish and wildlife—that are affected by hydropower development.

ECPA explicitly recognizes "adequate protection [of], mitigation [of damages to], and enhancement of fish

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guage would conflict with congressional intent as evidenced by legislative history).

[23] *See generally* Address by L. Powell, Jr., "*Stare Decisis* and Judicial Restraint," printed in the Record of the Association of the Bar of the City of New York, Vol. 44, No. 8 (Dec., 1989).

and wildlife (including related spawning grounds and habitat)" as numbering among the values which FERC must weigh in formulating its comprehensive plans under the Federal Power Act for development of the nation's waterways. 16 U.S.C. § 803(a)(1). Indeed, ECPA provides that FERC must give "equal consideration" to these fish and wildlife concerns. 16 U.S.C. § 797(e). Even more importantly, ECPA provides that FERC must also consider the "extent to which the project is consistent with a comprehensive plan . . . for improving, developing, or conserving a waterway . . . . affected by the project that is prepared by . . . (ii) the State in which the facility is or will be located." 16 U.S.C. § 803(a)(2)(A). Finally, ECPA added subsection (j) to section 10 of the Federal Power Act, thereby creating a procedure by which FERC must either include in each license any conditions recommended by the applicable state fish and wildlife agency, or publish formal findings explaining why those recommendations are inconsistent with law. 16 U.S.C. 803(j). Thus, by enacting ECPA, Congress enhanced the advisory role given to state agencies within FERC proceedings, while retaining FERC as the ultimate decisionmaker.

The legislative history of ECPA confirms the understanding of Congress that FERC is the ultimate decisionmaker under the Federal Power Act with respect to the impact of hydropower projects on fish. The House report on the ECPA legislation states that while ECPA "clearly and unmistakeably upgrades the status at FERC of recommendations of . . . the applicable State fish and wildlife agencies . . . . [t]heir role *is not a veto over a project.*" H. Rep. No. 507, 99th Cong., 2d Sess. 22 (1986), *reprinted in* [1986] U.S. Code Cong. & Admin. News 2496, 2509 (emphasis added). *See also* H. Conf. Rep. No. 934, 99th Cong., 2d Sess. 22-25 (1986), *reprinted in* [1986] U.S. Code Cong. & Admin. News 2496, 2538-2542 (section 10(j), added by ECPA, "does not give [state] agencies a veto, nor does it give them mandatory authority, such as provided in section 30(c) of the Federal

Power Act. . . . FERC is empowered to decide license terms and conditions").[24]

The enactment of ECPA shows that Congress recognizes the primacy of FERC in licensing decisions, that it approves of this Court's construction of the Federal Power Act, and that it does not intend that state agencies have more than an advisory role—admittedly an important advisory role, but advisory nonetheless—in weighing the effects on fish and fish habitats of proposed or operating hydropower projects. Even if the language and structure of the Federal Power Act as it existed prior to 1986 were not clear on these points, the enactment of ECPA should resolve any doubt.

III. *FIRST IOWA* AND *FEDERAL POWER COMMISSION v. OREGON* ARE NEITHER OVERRULED BY NOR INCONSISTENT WITH *CALIFORNIA v. UNITED STATES*

In tacit recognition of the full significance of *First Iowa*, California argues that the decision should not apply here because *First Iowa* was silently overruled by *California v. United States*, 438 U.S. 645 (1978). *California* held that under section 8 of the Reclamation Act of

[24] In considering these comments, it is important to note that ECPA was directed not at changing the basic structure of the Federal Power Act from a scheme of primarily federal, to a scheme of primarily state, regulation. *See* H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 23 (1986), *reprinted in* [1986] U.S. Code Cong. & Admin. News 2496, 2539 ("this amendment does not change . . . the present duties of FERC . . . under Sections 4, 10(a), and 18 of the Federal Power Act"). Instead, the 99th Congress in general expressly approved of the terms and judicial interpretations of the Act, H. Rep. No. 507, 99th Cong., 2d Sess. 11, 12, 21, 31 (1986), *reprinted in* [1986] U.S. Code Cong. & Admin. News 2496, 2498-2500, 2507, 2518, but directed the ECPA amendments at guiding FERC's discretion so that the agency would not give short shrift to non-power concerns. *Id.* at 17, [1986] U.S. Code Cong. & Admin News at 2563-64.

1902,[25] states may impose conditions on "control, appropriation, use, or distribution of water" in federal reclamation projects, to the extent the conditions are not inconsistent with congressional directives. The petitioner contends here that "[s]ince *California* holds that section 8 requires federal reclamation projects to comply with state regulatory water laws, and since section 27 [of the Federal Power Act] was modeled after section 8 [of the Reclamation Act], section 27 similarly requires hydropower projects to comply with such state laws." (Pet. Br. at 14).

California, however, involved the preemptive effect of a different statute having a markedly different purpose and structure and a savings provision having substantially different wording. The preemption ruling in *First Iowa*, moreover, is completely consistent with the *California* rationale, which requires preemption of state laws that are inconsistent with congressional directives. Section 10(a) of the Federal Power Act is just such a directive: it gives FERC exclusive responsibility for adapting projects so that they best advance the comprehensive development of the nation's waterways. California's attempt to overrule that adaptation and require different project operating conditions is inconsistent with the congressional directive and thus is preempted.

A. *California v. United States*

California v. United States arose from a controversy between the United States Bureau of Reclamation and California's Water Board concerning construction and operation by the Bureau of the New Melones Dam. 438 U.S. at 651. The Bureau had applied to the Water Board for a permit to appropriate the water that would be impounded behind the dam and later used for reclamation of arid lands. *Id.* at 652. Although the Water Board approved the application, it attached 25 conditions to the

[25] 43 U.S.C. §§ 372, 383.

permit. *Id.* The United States then obtained a declaratory judgment from the federal district court that the United States could impound whatever unappropriated water was necessary for its federal reclamation project without complying with conditions imposed under state law. *United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975), *aff'd*, 558 F.2d 1347 (9th Cir. 1977).

This Court reversed, invoking the savings clause of section 8 of the Reclamation Act. 43 U.S.C. § 383. Rather than taking a plain meaning approach to section 8, the Court looked to the Reclamation Act's legislative history, which showed that, while Congress intended the federal government to fund reclamation projects, the projects were to be operated in conformity with state law, except as provided in any "explicit congressional directive[s]." 438 U.S. at 673. The Court concluded that California's Water Board could impose conditions on the New Melones Project's permit to appropriate water, so long as those conditions were not actually in conflict with congressional directives regarding the project. 438 U.S. at 670-79.

B. The Differences in Structure and Purpose of the Reclamation Act and the Federal Power Act Require Different Interpretations of Their Preemption Provisions

In this case, California argues that section 8 of the Reclamation Act and section 27 of the Federal Power Act must be interpreted identically, since some of the language contained in section 8 appears in section 27 as well. (Pet. Br. at 14). The argument, however, ignores the fundamentally different statutory schemes to which the savings clauses pertain, and crucial textual differences that exist within those clauses themselves. Those differences require that *California's* broad reading of section 8 of the Reclamation Act not be grafted onto the Federal Power Act.

Indeed, in its briefing to this Court in *California v. United States*, California did not attack *First Iowa's* construction of section 27, but instead acknowledged that state "veto power" over the construction and operation of FERC-licensed hydropower projects would be inconsistent with the Federal Power Act:

> The Court [in *First Iowa*] properly rejected Iowa's argument, ruling that the federal government has exclusive authority to license the construction and operation of such projects . . . . This Court properly refrained from relying on *First Iowa* in its subsequent consideration of section 8 in *Ivanhoe* and *Fresno*, and should also refrain from doing so here.

Reply Brief for the Petitioners, *California*, at 17. The Court should similarly recognize in this case that, in view of the differences in statutory schemes and language, *California* does not require that section 27's interpretation be lock-stepped with section 8.

The Reclamation Act was designated principally to provide federal funding for irrigation projects in the arid West. *See California v. United States*, 438 U.S. at 664. Rather than imposing a broad scheme of regulation by the federal government, the Reclamation Act "merely authorize[s] the expenditure of funds in States whose citizens [are] generally anxious to have them expended . . . ." *California v. United States*, 438 U.S. at 651. The Reclamation Act, indeed, is so deferential to state law that its savings clause expressly preserves state laws relating to irrigation, the *central purpose* of the Act itself.[26] This deferential scheme implicitly recognizes that irrigation is a matter of exclusively local concern, and that regulation of it at the state level is, if not essential, eminently appropriate.

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[26] Thus, section 8 provides, in pertinent part, that nothing in the Act is intended to affect states' laws with respect to "the control, appropriation, use, or distribution of water *used in irrigation*." (Emphasis added.)

In contrast, the Federal Power Act was designed "to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the federal power to do so . . .," *First Iowa*, 328 U.S. at 180, and not merely to provide funding. To achieve its purposes, the Federal Power Act employs the efforts of thousands of licensees under supervision of a federal agency and gives that agency broad authority pervasively to regulate the construction and operation of hydropower projects. Furthermore, in contrast to the Reclamation Act's section 8, the Federal Power Act's savings clause does not purport to preserve state laws concerning the very purpose (hydropower development) of the entire statute. As this Court noted in *First Iowa*, if Congress had intended to subordinate the Federal Power Act's comprehensive regulation of hydropower projects to state laws concerning use of water by such projects, "the simple thing would have been to so provide." 328 U.S. at 178-79.

But the dissimilarity between section 8 and section 27 does not end with the substantial differences between the statutory schemes and purposes: the clauses are not even identical textually. While section 27 of the Federal Power Act may have been, as California repeatedly asserts, "modelled" upon section 8 of the Reclamation Act of 1902, fully half of the language in section 8 [italicized, below] has no analog in the Federal Power Act whatever. Section 8 provides as follows, in pertinent part:

> [N]othing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, *and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of*

> *the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof . . .*

(emphasis added). It is readily apparent that in "modelling" section 27 after section 8, Congress *chose not* to include any requirement that FERC "proceed in conformity" with state law.[27] The reason is obvious: the plain meaning of the italicized language is to subordinate federal regulation under the Reclamation Act to state law. In enacting the Federal Power Act, however, Congress did not intend to defer, but simply to provide for the continued effect of state laws involving matters of purely local concern, such as irrigation. The Federal Power Act is not the Reclamation Act, and Congress's use of similar language in a single independent clause in both Acts does not mandate otherwise.

Differing constructions in different contexts of water law savings clauses is neither novel nor anomalous. Instead, it is a longstanding and well-accepted phenomenon that reflects the fact that savings provisions are used in different acts with markedly different purposes. For instance, twelve years before *First Iowa*, the Court interpreted the Desert Land Act's savings provision[28] as having a broad effect in saving state water laws from preemption. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155-58 (1935). In *First Iowa*, this Court gave section 27 of the Federal Power Act a narrow construction without citing *California Oregon*. Thirty-two years later, in *California v. United States*, the Court gave section 8 of the Reclamation Act a broad construction without citing *First Iowa*. Thus, rather than creating an anomaly, the different constructions of sections 8 and 27 are simply illustrative

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[27] This significant difference in language between section 8 and section 27 was noted by California in its Reply Brief in *California v. United States*, at 16 n.3.

[28] Desert Land Act of 1877, § 1, 19 Stat. 377, 43 U.S.C. § 321.

of similar language interpreted differently when given different statutory qualifiers and when used in different contexts. If section 8 of the Reclamation Act had a "plain meaning" that could be interpolated into the Federal Power Act, the Court would surely have announced that meaning in *California*. That it instead construed that clause in the context of the Reclamation Act's history and structure only confirms that the same approach should be taken here.

C. *California v. United States* Is Entirely Consistent With the Decisions Below, Since the Federal Power Act Is a Statutory Directive Preempting State Regulation of Federally Licensed Hydropower Projects

Moreover, and quite apart from textual and structural differences between the Federal Power Act and the Reclamation Act, *First Iowa* is fully consistent with the rationale in *California v. United States* that state water laws remain intact only to the extent they do not conflict with "explicit congressional directives." 438 U.S. at 672-74. California's attempt dramatically to pare back the Rock Creek Project clashes with the requirements of the Federal Power Act and thus conflicts with clear "congressional directives." [29]

At the time the Commission granted the Rock Creek license, section 10(a) of the Federal Power Act provided:

> That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment

[29] On remand from *California v. United States*, the Ninth Circuit rejected California's broad contention that only "explicit federal statutory policies" constitute "congressional directives" that displace state law, *United States v. California*, 694 F.2d 1171, 1176 (9th Cir. 1982) (Kennedy, J.), instead holding that state regulations are preempted where they "clash[] with express or clearly implied congressional intent or work[] at cross-purposes with an important federal interest served by the congressional scheme." *Id.*, at 1177. Under this test, the New Melones conditions were upheld.

> of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

16 U.S.C. § 803(a) (1982).[30] Thus, section 10(a) both commands that the Commission "adapt" licensed hydropower projects to best suit "beneficial public uses" and delegates to "the judgment of the Commission" the determination of what best suits those uses. Furthermore, FERC is responsible, pursuant to its comprehensive planning responsibilities, for regulating the manner in which the Project operates. In determining what bypass flows to establish to promote its overall plan, FERC considered the needs for both power production and fishery resource protection. After considering the views presented and evidence submitted by both the Partnership and California, FERC struck a balance between those needs. That balance establishes a year-round bypass flow of 20 cfs. *See generally* Initial Decision, 41 F.E.R.C. ¶ 63,019, at 65,117-18 (1987) (reprinted in the Appendix hereto).

To permit California to impose its own regulations upon a hydropower project, licensed by FERC in accordance with the Federal Power Act's statutory authorization, is to permit states to supersede the "congressional directive" that FERC is to exercise its judgment as to which projects will best promote the beneficial public uses of the nation's water resources and how those projects should be operated. Fishery is but one of the public interests that FERC is required to balance in reaching its licensing decisions. To say, as California does, that that

[30] As previously noted, this section was amended in 1986 by ECPA explicitly to require consideration by FERC of fish and fish habitats.

interest is subject to reevaluation by a dissenting state agency is to say that all public interests are similarly subject. Such a reading would make a shambles of FERC's decisionmaking process and put hydropower projects at grave risk, impeding or even halting entirely the private investments Congress was anxious to encourage in enacting the Federal Power Act.

Moreover, that there is here a "statutory directive" requiring preemption is evident upon consideration of the legal dilemma with which the Partnership is faced under the Federal Power Act if it complies with California's regulation of bypass flows. California, through its Water Board, has ordered the Partnership to bypass 30 and 60 cfs; FERC has ordered that the Partnership comply with the lower, FERC-established flows, "irrespective of any action taken by [the Water Board]." FERC March 11, 1987 Order, 38 F.E.R.C. at 61,773. (Pet. App. 18) Under section 13 of the Federal Power Act, 16 U.S.C. § 806, the Partnership, having accepted the FERC License, is required to operate the Project "as [FERC] shall deem necessary to supply the reasonable needs of the then available market"; if it violates the terms and conditions of its License, the provisions of the Act or any FERC order, it is subject to license revocation or injunctive proceedings under section 26 of the Federal Power Act, 16 U.S.C. § 820, and risks substantial fines under section 31(c) of ECPA, 16 U.S.C. § 823b(c). Thus, by imposing bypass flows on the Project different than those established in the FERC License, California has imposed duplicative regulations on the Project which not only disrupt FERC's comprehensive planning, but also threaten to shut down the Project altogether. FERC's licensing decisions, issued pursuant to its delegated authority under the Act, constitute directives which clearly distinguish this case from the facts of *California*.[31]

[31] California argues that its bypass flows are not inconsistent with FERC's because the state's requirements are "more stringent." (Pet. Br. at 48-49.) The implicit assumption—that a state is prohibited from easing a FERC licensee's regulatory burden, but is free to impose regulations which make project operations more difficult or impossible—finds no support in the statute. It is, in fact, inconsistent with the clear intent of the statute to encourage development of water power and the clear intent of FERC to strike the appropriate balance between water power development and other public interests.

IV. THIS CASE DOES NOT INVOLVE "WATER RIGHTS" OF THE KIND SAVED FROM PREEMPTION UNDER SECTION 27

In holding that the state regulations in *First Iowa* and *FPC v. Oregon* were preempted by the Federal Power Act, this Court recognized that, while regulatory laws are preempted, "Section 27 [of the Federal Power Act] expressly 'saves' certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act." 328 U.S. at 175; *see* 349 U.S. at 445. Throughout its brief, California attempts to exploit this distinction by casting this case as a water rights case. But—as *First Iowa* and *FPC v. Oregon* squarely hold—state regulation and protection of fishery are *not* among the areas of state law protected from preemption by section 27. Furthermore, no 'water rights" cognizable under California law are involved in this case.

A. As *First Iowa* and *Federal Power Commission v. Oregon* Hold, FERC Has Exclusive Authority to Regulate Operations of Hydropower Projects So as to Protect Fish

In *First Iowa* and *FPC v. Oregon*, Iowa and Oregon strenuously asserted the need to preserve fisheries as a substantial basis for their attempts to prevent licensing of the projects at issue. But although the Court in those cases distinguished between state attempts to regulate a federal licensee's use of water (which are preempted), and state laws concerning proprietary water rights

(which are saved); it also squarely held that water use restrictions for the preservation of fisheries are regulatory—and thus preempted—rather than proprietary. Those holdings apply in full force in this case.

In *First Iowa*, the state regulations of concern to the Federal Power Commission included Iowa Code § 7771, which required that "any water taken from the stream in connection with the project [be] returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or *rendered deleterious to fish life*" (emphasis altered). In its briefs to this Court, Iowa contended that state regulation, including the dam release requirement, was necessary to preserve the river's fishery uses:

> The record shows without dispute that no provision has been made in the plan to preserve the fish in the river or to create an adequate fish way so that fish Cedar River.[32]
>
> The project would destroy the recreational and fishing facilities afforded the public in the Cedar River as now constituted.[33]

Similarly, fishery interests were again at issue in *FPC v. Oregon*, in which the Fish Commission of Oregon had vetoed a power project because it would cut off access of anadromous fish to their natural spawning grounds. 349 U.S. at 449-50 & n.22. Oregon, too, argued vigorously that its interests in preventing depletion of the fishery in the river were not preempted by the Federal Power Act.[34]

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[32] Intervenor's Resistance to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit (filed in *First Iowa*) at 4-5.

[33] *Id.* at 5; Brief for State of Iowa, Intervenor (filed in *First Iowa*) at 4.

[34] Brief for Respondents in Opposition (filed in *FPC v. Oregon*) at 5-7.

In both cases the Court held that the Federal Power Act was preemptive, and that allowing the state measures aimed at protecting fisheries to stand would result in a duplication of regulatory control not intended by Congress. 328 U.S. at 181-82, 349 U.S. at 443 n.9, 445. In so holding, the *First Iowa* and *FPC v. Oregon* opinions implicitly recognize that FERC's authority—and responsibility—for vindicating the public interest through regulation of hydropower plants is all encompassing. Thus, those cases establish beyond any doubt that California's effort to promote sport fishing by requiring specified releases from the Rock Creek Project is not a "water right" law saved from preemption. FERC is empowered to address fishery interests; it did address those interests—three times—in this case; and, as the results in *First Iowa* and *FPC v. Oregon* evidence, there is no justification in the statute or elsewhere for holding that those particular interests should be singled out for dual regulation.

B. Under California Law, This Case Implicates No "Water Rights" Whatever

First Iowa and *FPC v. Oregon* aside, California law itself demonstrates that no legally-cognizable "water rights" are implicated here.

California law recognizes two water rights doctrines: riparian rights and appropriative rights. *In re Waters of Hallett Creek Stream System*, 44 Cal. 3d 448, 452 n.2, 749 P.2d 324, 325 n.2, 243 Cal. Rptr. 887, 889 n.2, *cert. denied*, 109 S.Ct. 71 (1988). Riparian rights attach to land bordering a watercourse. *Id.* Rock Creek is located entirely on federally owned land between the project's diversion of water and its return of water to the creek. Order Issuing License (Major), 23 F.E.R.C. ¶ 62,137 at 63,203. Thus, this case does not present an issue of possible impairment of another's riparian rights.

Moreover, unlike some other Western states, California water law does not recognize any "appropriative"

water right to maintenance of instream flows. In *Fullerton v. State Water Resources Control Board*, 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1979), the California Department of Fish and Game sought to compel the Water Board to issue a permit to appropriate water to provide minimum flow guarantees for the protection of fishery resources. *Id.* at 593, 153 Cal. Rptr. at 520. The Department did not seek to divert water, but rather sought to appropriate a minimum flow which would remain in the river "for the benefit of the fish and to protect the right of the people to fish in the public waters of this state . . . ." *Id.* at 594, 153 Cal. Rptr. at 521. After the Water Board returned the Department's application without action, the California Court of Appeal sustained the Board's position that appropriative rights could not be granted for "instream uses" for protection of fisheries. The Court of Appeal reasoned that "some minimal actual physical use of the water is still an element of the doctrine of appropriation in this state . . . ." *Id.* at 593, 153 Cal. Rptr. 520. Finding no authority for a "valid appropriation in the absence of some physical activity or possession of the land," *id.* at 599, 153 Cal. Rptr. at 524, the Court of Appeals held that:

> There is no support in the law of this State for the proposition that a minimum flow of water may be appropriated in a natural stream for piscatorial purposes without some physical act by the appropriator.

Id. at 603, 153 Cal. Rptr. at 527. *Accord, California Trout, Inc. v. State Water Resources Control Board*, 90 Cal. App. 3d 816, 820, 153 Cal. Rptr. 672, 674 (1972). California does not possess the land on which the Rock Creek project operates, nor does it plan to make physical use of the minimum flows it wishes to require. No appropriative water right is involved.[35]

[35] Although California law does not permit an instream appropriation of water to provide minimum flow guarantees to protect fisheries, California water law does consider fishery interests in appropriation proceedings. The Water Board considers the relative benefits to be derived from all beneficial uses of the water, including the preservation and enhancement of fish and wildlife, in authorizing appropriations. *See* Water Code § 1257. Again, these state interests are regulatory, not proprietary.

That California's regulation is not a "water rights" regulation is underscored by the fact that the configuration of the Rock Creek Project precludes any holder of a water right, other than the Partnership and the federal government, from being affected by the Project's operation at any bypass flow rate. No upstream or downstream water rights holder is in any way affected; the only effect is on the flow of the reach of Rock Creek on federal lands. As the Water Board conceded in the district court action, it was:

> not aware that any person other than the Partnership holds any prior appropriative or riparian water right that is affected by diversion of water from the Creek at the Project's diversion structure and the return of the water to the Creek at the Project's tailrace.

Stipulation of Facts and Authenticity of Documents at 8, ¶ 17, *Rock Creek Limited Partnership v. State Water Resources Control Board*, No. S-87-0523 (E.D. Cal. Aug. 21, 1987) (J.A. 142).

California's claims that its bypass flow requirements should be treated as a "water right" law is further undercut by the fact that the Project already has the water rights necessary to operate. Under the California Supreme Court's unanimous decision in *In Re Waters of Hallett Creek Stream System*, 44 Cal. 3d 448, 749 P.2d 324, 243 Cal. Rptr. 887, *cert. denied*, 109 S.Ct. 71 (1988), the federal government, like any private landowner, has a riparian right to use water adjacent to land it owns. These rights are defined by the license to be a part of the Project which the license authorizes to operate. Similarly, under the federal reserved water rights

doctrine set forth in *Cappaert v. United States*, 426 U.S. 128, 138 (1976), and *United States v. New Mexico*, 438 U.S. 696 (1978), in withdrawing land from the public domain and reserving it for a federal purpose,[36] the federal government reserves appurtenant water, to the extent then unappropriated, to accomplish the purpose of the reservation.

Thus, California's claim that its bypass flow requirement is a "water rights" law within the meaning of *First Iowa* is belied both by the fact that no one's water rights are being affected and by the fact that the Project has water rights sufficient to operate from other sources. California cannot circumvent *First Iowa* by the simple expedient of inserting its regulations in a previously-issued permit to appropriate water. At bottom, the fact remains that in imposing the bypass flow requirement, California has not acted as an arbiter of rights between persons competing for use of water, but instead as a regulator seeking to promote public values unrelated to property interests. Under *First Iowa*, *FERC*, not the state, is responsible for assessing and promoting those values.[37]

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[36] Upon filing of the application for a FERC license, such a withdrawal was made of the federal land on which the Rock Creek Hydroelectric Project is located. 16 U.S.C. § 818.

[37] Where state-conferred water rights *are* involved, the developer of a hydropower project must secure those rights by purchase or condemnation. As this Court stated in *Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369, 377, 379 (1930), the Federal Power Act "does not purport to authorize a licensee of the Commission to impair [water] rights recognized by state law without compensation." *Accord, Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 251-55 (1954). *Cf. Portland General Elec. Co. v. Federal Power Comm'n*, 328 F.2d 165, 176 (9th Cir. 1964) (only purpose of section 27 is to ensure compensation for state-conferred water rights taken by federal licensees).

CONCLUSION

For the reasons set forth above, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Project No. 3189-014

ROCK CREEK LIMITED PARTNERSHIP

INITIAL DECISION

(November 16, 1987)

Stephen L. Grossman, Presiding Administrative Law Judge.

Appearances

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Alton Albert Lind for the Lind Family, *Pro Se*

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Background

On April 29, 1983, the Commission issued a license for the Rock Creek Project No. 3189, located on Rock Creek, in El Dorado County, California to Joseph M. Keating. 23 FERC ¶ 62,137 (1983). On September 10, 1985, the Commission authorized transfer of the license to the Rock Creek Limited Partnership. 32 FERC ¶ 62,566 (1985).

Rock Creek is a tributary of the South Fork of the American River, located about 40 miles east of Sacramento, California. The project consists of: (1) a 6-foot high, 80-foot-long concrete and rock overflow diversion structure at elevation 1,265 feet with 3-foot high flashboards, and impounding; (2) a 0.36-acre power forebay reservoir with a usable capacity of 5.2 acre-feet; (3) a 500-foot-long, 72-inch diameter concrete pipe; (4) a 3,200-foot-long, 9-foot diameter unlined horseshoe tunnel; (5) three 400-foot-long steel penstocks, two 36-inch-diameter penstocks and one 30-inch-diameter penstock; (6) a concrete block powerhouse at elevation 1,052 feet containing three mobile crossflow generating units, two rated at 1,125 kW each and one rated at 750 kW for a total of 3,000 kW, situated approximately 200 feet upstream of the confluence of Rock Creek with the South Fork of the American River; (7) three 100-foot-long, 4.16 kVA 4.16/12.0 kV transformer; (9) [sic] a 75-foot-long, 12-kV transmission line; and (10) appurtenant facilities. 25 FERC ¶ 62,137, at p. 63,203; Ex. FG-2.

The project requires between 15 and 240 cfs to operate. Water to operate the project is diverted at the project diversion structure through the concrete pipe, tunnel and penstock to the powerhouse, and thence back to the creek. A 5,100-foot reach of Rock Creek is bypassed by these project works, and it is this diversion reach with which we are here concerned. The gradient of the inversion reach is high (11.5 percent) upstream and low (4.0 percent) at the powerhouse.

The license, Article 37, requires the licensee to maintain interim minimum flows through the 5,100-foot bypass reach of Rock Creek of 11 cfs during the months of May through September, and 15 cfs during October through April. These minimum flows were designed to protect brown trout, the principal species then believed, as reported in the license application (Ex. FG-13 p. 3), to inhabit the bypass reach. Article 38 of the license required the licensee, in consultation with the California Department of Fish and Game (CDFG) and the U.S. Fish and Wildlife Service (USFWS), to conduct studies to determine the permanent minimum flow release and other measures needed to ensure protection and enhancement of the fishery resources in the bypass reach. The licensee was required to report its findings and obtain Commission approval for its recommendations for a minimum flow release and other fishery protection and enhancement measures.

In an October 4, 1985 report to the Commission, the licensee recommended that the interim minimum flow regime be adopted as a permanent minimum flow regime. The CDFG, on December 6, 1985, recommended that the Commission reject the licensee's report and adopt instead a permanent minimum flow regime of 30 cfs from October through February, and 60 cfs from March through September. The CDFG based this recommendation on data demonstrating rainbow trout, not brown trout, is the predominant resident species in Rock Creek. (Ex. FG-14, p. 3).

On July 9, 1986, as supplemented September 5, 1986, the licensee petitioned the Commission for a declaratory order confirming that the Commission has the exclusive jurisdiction to set minimum flows for the project and that the licensee would not have to comply with an order, when issued, that the California Water Resources Control Board (Board) was expected to issue requiring the licensee to enforce CDFG's recommended 30-60 cfs minimum flow regime.

The Commission, on March 11, 1987, affirmed its exclusive jurisdiction. It directed the Chief Administrative Law Judge to designate a Presiding Administrative Law Judge to conduct an expedited hearing to consider the minimum flow issues. 38 FERC ¶ 61,240, at p. 61,771 (1987).

The Commission ordered the Presiding Judge to consider: (1) the minimum flows necessary to "protect and enhance" the rainbow trout population, including adult, spawning, and fry habitat; (2) the impact on project operations and financial and economic feasibility of the minimum flows recommended by any party; and (3) alternative mitigation measures, if any. 38 FERC at p. 61,774.

Hearing was held July 14-16, 1987, and briefing by the parties was completed September 22, 1987.

Minimum Flows

A number of studies have been conducted to determine the minimum flow releases necessary to ensure the protection of the fishery resources. Three instream flow studies designed to examine hydraulic features of a stream and to describe the relationship between streamflow and the amount of fish habitat have been performed. Fish habitat was used instead of fish population in the instream flow studies because of significant variations that can occur in the size of fish populations over a time. (Ex. RC-24, p. 6.) Methods used by various parties to examine the effects of reduced flows on fish in Rock Creek include visual observations, the Tennant Method, and the Physical Habitat Simulation Model (PHABSIM). Because no site-specific habitat curves have been developed for Rock Creek, generic curves (known as Bovee's and Raleigh's) were used. Several sets of hydrological data were also presented.

Each method relates, in greater or lesser measure, to the Instream Flow Incremental Methodology (IFIM) developed by the USFWS Instream Flow Group. The IFIM includes the PHABSIM model, which incorporates fish suitability curves, and data on temperature, water quality, hydrology, and population.

Based upon the testimony sponsored by the parties, the following minimum flows are proposed:

Licensee	Year-round	15 cfs
CDFG	October 1—February 29	30 cfs
	March 1—September 30	60 cfs
Staff	January 1—February 29	30 cfs
	March 1—May 31	50 cfs
	June 1—30	25 cfs
	July 1—October 31	15 cfs
	November 1—December 31	20 cfs

The project cannot operate without at least 15 cfs of water diverted to the powerhouse, and cannot use more than 240 cfs in operation. Thus, Rock Creek flow of the prescribed minimum plus 15 cfs is necessary for the project to operate. Similarly, all flows in excess of prescribed minimum flow plus 240 cfs will remain in the bypass reach. Licensee stipulated at the hearing that it would observe 15 cfs as the year-round minimum flow during the pendency of this case (Tr. 273). Under this regime, natural creek flow will have to equal 30 cfs before the project can operate; flows in excess of 255 cfs will flow through the bypass reach in addition to the required 15 cfs minimum. This means the bypass reach will flow at its natural level up to 29 cfs. From creek natural flows between 30 and 255 cfs, the bypass reach will have a flow of 15 cfs. Above 255 cfs natural flows, the bypass reach will benefit from 15 cfs plus all water over the 255 cfs level.

River hydrology was described by Dr. John H. Humphrey (Ex. RC-1) and Mr. James A. Schuler (Ex. FG-13, citing a DFG report submitted as Ex. FG-14). There is little difference between the two presentations. Annual

mean flows are determined by Humphrey to be 86.1 cfs and by DFG to be 58.1 (Ex. S-22). For purposes of this decision, the higher 86.1 cfs figure will be used. Similarly, resident fish population data presented by CDFG (See Ex. RC-78), which disclose higher numbers than the data of licensee, shall be used. In other words, those data more favorable to a higher fishery base line are used in determining the level of protection to be afforded the fishery.

Four matters have been raised by Licensee and CDFG which will be disposed of first. Interpretation of Articles 37 and 38 of Rock Creek's license is not properly an issue. The Commission hearing order of March 11 resolved the questions raised by the parties. Also not at issue here is the assertion by CDFG that the provisions of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495 (Oct. 16, 1986), do or should apply in this case. That they do not is made clear by the March 11 order (at 38 FERC at p. 61,774, n. 6). This issue may not be relitigated now. Additionally, no party suggests any mitigation measures apart from recommended minimum flows, and, therefore, none will be discussed. Finally, the issue of balance between fishery and power (except as to levels of minimum flow) has been decided in the original licensing case, and is not at issue here.

The fish we are concerned with are native, resident rainbow trout achieving adulthood at about five-to-seven-inch length. They are the predominant sport fish in Rock Creek. They are not, however, the most numerous Rock Creek fish. Rainbow trout are outnumbered by suckers, squawfish and sculpins. Other fish, including green sunfish and brown trout, are also present (Ex. RC-24). The parties agree minimum flows through the almost mile-long diversion reach are necessary to protect the resident fishery.

Two basic methods are used to support minimum flow recommendations in this case. Licensee proposes flows

based upon its analysis of requirements to maintain sufficient habitat to ensure survival of the existing, pre-project fish population in the diversion reach. CDFG and Staff analyze necessary flows as a required percentage of average annual natural flow to maintain maximum pre-project habitat in the affected reach.

Licensee presented studies of Mr. Thomas R. Payne, a Certified Fishery Scientist as recognized by the American Fisheries Society, and Dr. Donald Chapman, who holds a doctorate in fisheries. Both have extensive experience in studying fisheries on rivers and streams. Ex. RC-24, 25, 32, 33.

Their analyses show that Rock Creek is a "flushing" stream, having widely divergent median flows in different seasons of the year, and from year to year. Sustained flows average 11 to 13 cfs in summer and more than ten times that amount in winter, with flooding from winter storms in some years up to a thousand times the summer flow (Ex. RC-1, 23, 32). In poor water years, sustained summer flow can be as low as 5 cfs (Ex. RC-32, Tr. 187).

The diversion reach is a box-shaped channel. Unlike most streams which have a more saucer-like cross-section, the box shape of the diversion reach results in much lower loss of wetted stream perimeter as water level declines. As a result of this atypical stream bed configuration, Mr. Payne concludes the wetted perimeter of the diversion reach increases only 11 percent in the high gradient section and 16 percent in the low gradient section when water flow increases from 15 to 60 cfs, and 18 percent when water flow increases from 10 to 60 cfs (Ex. RC-24).

Dr. Chapman notes that either very high winter flows or very low summer flows act to "pinch" resident rainbow trout population in Rock Creek, and that there is little migration upstream into the diversion reach from

the South Fork of the American River because of numerous cascades in the area (Ex. RC-76).

Dr. Chapman visited Rock Creek on May 5, 1987. The project was not operating at the time because prior high water had caused damage to the diversion fish screen. He measured stream flow over the diversion structure as 15 cfs, although the gauge, which is not particularly accurate at low flows, read 12 cfs.

Dr. Chapman examined the habitat available to the resident fish and found spawning gravel in the diversion section sufficient to sustain the observed population. He observed that Rock Creek rainbow trout mature to smaller size than do rainbow trout at higher elevation rivers and streams. Thus, Rock Creek trout require smaller gravel for spawning because of their inability to move the larger stones to form redds.

Dr. Chapman's visit coincided with the fishing season on Rock Creek which opened April 26, 1987. Ex. FG-6. He observed little evidence of fishing activity along the diversion reach. Mr. Lind, an upstream license applicant, testified that he has observed virtually no fishing activity in this stretch of Rock Creek over a period of several years. Ex. L-1. He added that the diversion reach is particularly difficult to enter for anglers since it is situated in a steep-sided canyon with limited access. CDFG and Staff argue Rock Creek is a little gem of an undiscovered fishery. The evidence belies this claim. Two Sacramento newspapers reported Rock Creek as an early season fishery (Ex. F-5, 6) at the onset of the fishing season, yet no evidence of use of the stream was noted at the diversion reach on the tenth day of the season. Whatever Rock Creek may be as a fishery, especially in the vicinity of the diversion reach, it is not shown to be a popular one. Nor is it shown that access might be improved to allow greater fishing opportunities, especially in the diversion reach.

Based on their examination of the diversion reach, Mr. Payne and Dr. Chapman recommend year-round minimum flows of 15 cfs as sufficient to protect the preproject fish population. Both observed the existing habitat on the date of their visit with a measured 15 cfs flow was not fully utilized by the resident fish population. Inasmuch as the visit occurred at the height of the fishing season, it is expected that the maximum number of adult fish would be present. Thus, their observations occurred at their recommended flow level with the maximum or close to the maximum number of adult fish present. (Ex. RC-32, 68.)

Mr. Payne had testified that a minimum flow of 10 cfs would be sufficient because of the consistency of habitat area at varying flows, but he felt more comfortable with a 15 cfs flow (Tr. 91-93). He found that the 15-20 cfs range represents the inflection point at which flow reduction begins to draw water away from stream banks and thus reduces habitat area.

The analysis methodologies used by CDFG and Staff had their bases in preserving the greatest amount of habitat as measured by model transect curves and their application. CDFG began with the so-called Tennant method, developed by Donald L. Tennant for the U.S. Fish and Wildlife Service in 1975 (Ex. FG-20). That method calls for a minimum instantaneous flow of 10 percent of annual average flow to sustain short-term habitat for most aquatic life forms. A 30 percent flow will sustain good habitat, while 60 percent will sustain excellent to outstanding habitat. Tennant, however, developed his criteria on rivers having the usual saucer-shaped contour, where relatively small changes in flow would have significant effects upon available habitat. Tennant reported (Ex. FG-20) that on systems he studied, 10 percent flow covered only 60 percent of the substrates. As reported by Mr. Payne, a 10 cfs flow covered virtually all usable substrate on Rock Creek.

Staff's recommendations were presented by Mr. Edward L. Melisky, an ecologist who earned a master's degree in fisheries management, and who is certified by the American Fisheries Society as a Fisheries Scientist. Ex. S-17. CDFG presented recommendations prepared by Mr. Mike Meinz and Mr. James A. Schuler. Mr. Meinz is an Associate Fisheries Biologist with the CDFG. He holds a bachelor's degree in Fisheries Biology, and has extensive experience in analyzing flows necessary to protect resident trout populations in California rivers. Mr. Meinz visited Rock Creek many times since 1983 and participated in two fish population surveys on the stream. Ex. FG-1. Mr. Schuler holds a bachelor's degree in Natural Resources Management, and is an Assistant Fisheries Biologist with the CDFG. He participated in the CDFG analysis of Rock Creek and the Rock Creek fishery. He has visited Rock Creek on several occasions. In large measure, his recommendations are based on his perceived need for flows, at least in spring and summer, most conducive to fishing. Ex. FG-13.

CDFG used Bovee curves to determine the adequacy of habitat and fish preference at the 60/30 cfs flow levels it supports. It found sufficient habitat and concluded appropriate fish preference at that level. It is noted CDFG calculated 60 cfs as 60 percent of annual average flow, even though the average flow is 86.1 cfs.

Staff similarly used Bovee curves to determine the maximum habitat area which could be provided.

Licensee disagreed with reliance on Bovee, rather than the more recent Raleigh curves which had been developed for western Sierra streams. Staff and CDFG argue Bovee curves were agreed to in the Article 38 study. This is not so. The agreement was to use published curves. Only Bovee curves were published at that time, but the use of newer, published curves was not prohibited.

Here, however, the argument is one of no consequence. Neither set of curves is particularly meaningful in the

atypical diversion reach. Data from the curves simply are not descriptive of reality in Rock Creek.

Reliance on the Tennant methodology and Bovee curves, neither of which provides accurate, site-specific data, cannot be given controlling weight.

Where all this leaves us, then, is with the site-specific Payne/Chapman analysis and recommendation of year-round 15 cfs flows. Mr. Payne, however, informs us that the inflection point occurs somewhere between 15 and 20 cfs. Therefore, caution and due concern for the fishery requires a minimum year-round flow in the diversion reach of 20 cfs. In real water terms, this means the diversion reach will have natural flow of Rock Creek at natural flows up to 35 cfs. For natural flows of 35 to 260 cfs, the diversion flow will be 20 cfs. At natural flows above 260 cfs, the diversion flow will be the excess above that flow plus 20 cfs. This flow regime has been shown by Mr. Payne and Dr. Chapman to provide sufficient habitat to maintain at least the pre-project fishery.

CDFG and Staff maintain that low flow levels will raise water temperatures in the diversion reach. That effect is less likely at 20 cfs, and, in any event, has not been demonstrated to be of significant adverse concern. The diversion reach will have flowing water at all times. The stream bed is overhung with considerable vegetation, shielding it from much of the direct summer sun. More importantly, naturally occurring summer flows are so low that the project will rarely operate during the hot months. CDFG's argument that lower flows will increase fishing pressure by increasing an angler's chances of success is not persuasive especially in the absence of showing that there is significant fishing activity.

This is not to find CDFG's concerns are misplaced. They are not. Nor are those of Staff. The decision here finds the results intended by both, as well as by licensee, will be met in the manner set forth above.

There remains the matter of the financial ability of the project to operate at various flow levels. This has now become a non-issue. Licensee could continue to operate, albeit marginally, at the flow level proposed by CDFG, and with a somewhat higher return under Staff's proposal. Licensee's ability to operate with a measure of financial security at the flows directed here seems evident. This is true whether licensee's investment and rate base are calculated as propounded by Staff or licensee.

Staff, which views only the initial cash investment and costs of the project, is correct in this regard. The financial feasibility of the project must be viewed as of the time of license application. Licensee was on notice by the license issued that minimum flows might be increased, thus imperiling the success of the project. All subsequent actions of the licensee and his successor, including the payment by the successor for the original licensee's rights and property, were at its own risk.

As a result of this decision, licensee's actual return will be lower than that contemplated by the license application because of increased minimum flows, the cost overruns experienced in constructing the project, and, in licensee's calculation, the amount paid Keating for his interest in the project. The return will be somewhat less than contemplated by licensee when it purchased Keating's interest because of the increased minimum flows. Precise quantification of return at the ordered minimum flow is not possible on this record because no party proposed that precise flow and presented relevant evidence. The return, however, is sufficient to preserve the power-fishery balance struck by the Commission in the original license proceeding, for here, unlike most hydroelectric development cases, the pre-project fishery will be completely preserved, not merely protected at some lower level, while the licensee operates with sufficient financial stability.

Licensee proposes, on brief, additional monitoring to determine if the ordered minimum flow is appropriate over time. Staff, in its reply brief, agrees. The proposal has significant merit, for there is no guarantee of success in any minimum flow regime. Since there is no specific plan of record to accomplish this task, licensee shall be directed to develop, obtain CDFG and Staff concurrence for, and file such a plan. The plan shall permit reassessment of minimum flows by the Commission at the end of a 5-year period, or sooner if a party demonstrates a substantial need.

It is ordered, subject to the Commission's Rules of Practice and Procedure:

(1) That the first sentence of Article 37 of the license issued April 29, 1983 (23 FERC ¶ 62,137) in Project No. 3189, is amended to read:

Licensee shall discharge from the Rock Creek diversion dam continuous minimum flows equal to the lesser of inflow to the reservoir or 20 cubic feet per second (cfs).

(2) That licensee shall, within 90 days of the effective date of this order, develop a monitoring plan to assess the effectiveness of the minimum flow directed in paragraph (1) of this order, obtain concurrence of the California Department of Fish and Game and Commission Staff, and file that plan pursuant to Article 38 of the license.